Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
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Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act On Rules Affecting Competition in the Television Marketplace	))))	MB Docket No. 05-28

To: The Media Bureau

COMMENTS OF NBC UNIVERSAL, INC.

A free, over the air television station's most essential product is its programming. As any other business sells its products, a local station sells its programming — to viewers, to advertisers and, in some cases, to other distribution systems. A local station, like any other business, has the right to sell its property for what the free market will bear. The success of such negotiations in part determines what news and other programming the station can afford to develop in the future.

Congress has asked the Commission to report as to the effect on competition between satellite and rural cable operators of several Commission policies – including retransmission consent and syndicated exclusivity. These policies have a common root: they advance free-market competition by protecting the right of local broadcast stations and other distribution systems to resolve, through free, private negotiations, the value of a station's programming, which other distribution systems then re-sell to their customers. Because elimination of these policies would degrade private property rights, and the highly competitive programming marketplace presents no extraordinary justification for government intervention, these policies should be broadly upheld.

Retransmission Consent Ensures that Private Parties, Not the Government, Can Determine the Value of a Station's Programming

Retransmission consent is not some special Commission policy designed to protect free television against pay-distribution systems; retransmission consent is nothing more than Communications Act jargon for the free market. Retransmission consent is the right of a local station to negotiate a fair return in exchange for granting a license to a multichannel video programming distributor ("MVPD") like a cable or DBS operator to include that station in the programming packages that it then sells to consumers. Retransmission consent does not give a broadcaster an unfair advantage in the marketplace; to the contrary, as every station wants to maximize its viewership, stations have every reason to seek redistribution (and, under federal statute and the Commission's Rules, have a good-faith obligation to conduct retransmission negotiations).[1] That a station, as a property owner, retains the right to negotiate a free-market deal for its programming simply ensures that local stations do not have to give away their most valuable private asset – their programming – to their MVPD competitors (who then can use that programming to attract customers away from the station and the station's advertisers.)

Similarly, the specific terms for a station's programming that are developed between a programming redistributor and a specific broadcaster are a matter of private negotiation, not government regulation. As the relevant Senate committee noted in the legislative history underlying the 1992 Cable Act:[2]

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1 *See* 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. 76.65(a) (requiring television stations to negotiate in good faith with other redistribution systems).

2 *See* Cable Television Consumer Protection and Competition Act of 1992, Senate Report at 36 (as cited by *In the Matter of Implementation of the Satellite Home Viewer*

> It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.

As a practical matter, such negotiations help to ensure that the relevant parties understand the scope of the rights at issue: for example, many stations cannot agree to MVPD retransmission of certain programming outside of the station's designated market area. A local station, like a manufacturer or swimming pool operator, has the right to sell its product, either as a retailer to consumers or a wholesaler to other businesses – whether that product is award-winning local news programming or equipment or taking a swim in a private pool. Conversely, as the free market requires that a cable or a DBS operator must acquire the equipment or power or workers it needs to operate, so the free market compels cable and DBS operators alike to negotiate for the station's consent for the operators to retransmit a particular local station's programming.

Congress and the Commission long ago settled that respect for private property rights should not evaporate simply because a local station chooses to broadcast a program to consumers. [3] The free market understands that a broadcaster, like other private businesses, may choose to retail a product under one set of terms to consumer endusers and to wholesale the same product on another set of terms to those who wish to resell that product. That a local station chooses to deliver its products to some for

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Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order, 15 FCC Rcd 5445 (2000)).

[3] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 325(b) (conditioning right of cable system to retransmit local programming on retransmission consent or a mandatory carriage election); *Implementation of the Cable Television of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993), *clarified*, 8 FCC Rcd 4142 (1993).

free accordingly does not bar it from charging those who want to take its product and sell it to other consumers.

As to the specific issue at hand, the current free-market policy cannot be said to skew MVPD competition because retransmission consent requires all multichannel video programming distributors that want to retransmit a local station's programming to get that station's consent. That these negotiations do not necessarily result in the same terms for different redistributors is further proof that the free market is the best way to determine the appropriate value of the programming for each redistributor. Likewise, that in many cases such free-market negotiations result in nothing more for a station than better channel placement on a cable system's lineup does not render trivial the free market principles underlying the policy.

As retransmission consent is nothing more than the free market, those who want the government to intervene in currently private negotiations must prove that extraordinary circumstances justify that intervention. In today's world of a hundred-plus channels on cable or DBS systems, no station's programming is so dominant as to demonstrate market power, and broadcast stations, as a group, have no overriding means or motive to discriminate against the multichannel distributors that help to increase viewership of their stations. [4] Without extensive proof justifying government intervention in the free market, the Commission and Congress should continue to support the current system that permits a local station to enter into private negotiations with MVPDs that want to retransmit the station's programming.

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[4] *See* Report on the Packaging and Sale of Video Programming Services to the Public at 80 (submitted by Federal Communications Commission to House Committee on Energy and Commerce on November 18, 2004) (holding that traditional antitrust claims are sufficient to maintain competitiveness of programming redistribution market).

Syndicated Exclusivity Similarly Protects the Free Market and Consumers

The Commission's syndicated exclusivity policies have two key elements: i) to protect the right of private parties to negotiate critical terms like exclusivity (and to enforce that right against certain third parties that may redistribute such programming); and ii) to define the maximum extent of any grant of exclusivity to a specific geographic area.

The first policy is, again, just the free market -- it allows a station and a syndicated programming provider to negotiate the scope of any exclusive arrangement as one of many issues during a station's private negotiations to acquire the right to broadcast and otherwise distribute a program. In these negotiations, the syndicator has two critical goals: to maximize the return on the programming in this particular deal and to maximize the number of other potential customers for the programming. [5] A station wants to ensure that the program it is buying will attract viewers and advertisers. Accordingly, a station wants to protect its investment by ensuring that no other competing stations also have the right to air the same program while a syndicator wants, all things being equal, to limit the station's zone in which it can claim exclusivity so the syndicator can sell the programming to more stations. The syndicator also wants to limit the cable or other redistribution systems that have the right to retransmit its programming outside of the station's immediate service area. In most cases, these competing goals result in privately-negotiated terms that serve the parties and

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[5] *See In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (¶ 71) (1988) ("*Syndicated Exclusivity Order*").

consumers. As the Commission noted in reinstating syndicated exclusivity rights for broadcasters more than 15 years ago: [6]

> The important point about competition with clearly defined property rights is that arrangements will differ with circumstances, but the arrangement that is reached in any particular circumstance is likely to be the one that best meets the demands of viewers.

In these instances, the Commission's policy just enables syndicators and broadcasters to know that their agreed-upon exclusivity rights can be enforced against parties necessarily external to the syndicator's and station's negotiations, including other distribution systems like cable and DBS operators and distant signals. It also ensures that broadcasters have the right, as other distributors, to negotiate areas in which programming will be exclusively available through a station.

The second policy limits such free-market negotiations, but only in the odd and troubling circumstance in which a station demands an exclusive right to a program within an unusually broad geographic area. By affirmatively limiting any "exclusive" geographic area, this policy seeks to protect consumers, multichannel video programming distributors (including rural cable operators and DBS providers) and smaller local stations against distant signals seeking unusually broad exclusivity zones. [7] Otherwise, in an unfettered free market, a station -- especially a more powerful station - could decide to pay more for a program in exchange for exclusivity far beyond the station's typical service area. In that case, cable systems or DBS operators

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6 *Id.* (¶ 89).

7 *See Request for Ruling by Press Television Corporation Concerning Applicability of Section 73.658(m) of the Commission's Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market*, Memorandum Opinion & Order, 4 FCC Rcd 8799 (1989) (explaining that initial exclusivity rules were designed to protect the public and other distributors against "excessive contractual exclusivity").

outside that station's DMA that wanted to carry the program would have to incur the additional copyright and other burdens of carrying a distant signal to their subscribers to access the program, as well as adding to the number of free, over the air stations a MVPD has to carry. [8]

By limiting exclusivity to a specific and fixed geographic zone, the Commission ensures that more local stations have the chance to acquire programming. That in turn means that far fewer cable systems will have to face the copyright burdens compelled by the transmission of distant signals just to get a particular program and far more consumers can expect to have over-the-air or basic-tier access to a popular syndicated program, as well as establishing clear baselines for all of the many actors involved in syndicated programming relationships.

Decades of precedent have demonstrated that the Commission's chosen geographic zone strikes a reasonable balance among the competing interests of syndicators, stations, redistributors, and consumers, especially those that are not able to participate in the negotiations establishing certain exclusivity rights. [9] Accordingly, without overwhelmingly compelling evidence that this long-established policy no longer

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8 *See, e.g.*, *Syndicated Exclusivity Order*, 3 FCC Rcd 5299 (n. 187).

9 *See, e.g.*, *Request for Ruling by Press Television Corporation Concerning Applicability of Section 73.658(m) of the Commission's Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market*, Memorandum Opinion & Order, 4 FCC Rcd 8799 (1989) (clarifying rule in particular case to enable outlying station to compete against other larger stations); *Amendment of Part 73 of the Commission's Rules with Respect to the Availability of Television Programs Produced by Non-Network Suppliers to Commercial Television Stations and CATV Systems*, 59 FCC 2d 1058 (1976) (implying that policy intends to protect smaller Sarasota stations and their consumers from nearby Tampa stations, which otherwise would preclude Sarasota stations from access to much programming).

serves the public interest, the Commission should uphold its existing syndicated exclusivity policy.

CONCLUSION

For the foregoing reasons, any report to Congress relating to retransmission consent and syndicated exclusivity should uphold existing Commission policies and the free-market and pro-consumer principles that underlie such policies.

Respectfully submitted,

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